2nd Civil No. B 114226
LASC No. BC 008240

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION

SYED MOUZZAM ALI,

Plaintiff, Respondent and Cross-Appellant,

vs.

THE CITY OF LOS ANGLES [sic], A Municipal Corporation,

Defendant, Appellant and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT OF
LOS ANGELES COUNTY
HONORABLE LAWRENCE W. CRISPO, JUDGE

APPELLANT'S OPENING BRIEF

JAMES K. HAHN, City Attorney
(SBN: 66073)
CLAUDIA McGEE HENRY,
(SBN: 57758)
Senior Assistant City Attorney
MICHAEL L. KLEKNER,
(SBN: 82100)
Deputy City Attorney
1700 City Hall East
200 North Main Street
Los Angeles, California 90012-4130
Telephone: (213) 847-5690

Attorneys for Defendant,
Appellant and Cross-Respondent
CITY OF LOS ANGELES

[Table Of Contents And
Authorities Omitted In Printing]

* * *

VI. ARGUMENT

A. THERE WAS NO PHYSICAL TAKING.

The trial court erroneously found that the City's action in securing the Ferraro Hotel to prevent arson fires constituted a physical taking under the authority of *Loretto v. Teleprompter Manhattan CATV* (1982) 458 U.S. 419, 73 L.Ed.2d 868, 102 S. Ct. 3164. (JA, XIV, p. 3830.) The facts in *Loretto*, however, make it clearly distinguishable. New York law required landlords to permit cable television companies to install their cables and ancillary equipment on their property. Under those circumstances, the government essentially created an easement in Loretto's property for the benefit of a third party (Teleprompter), and no matter how small an area the cable equipment occupied, a taking had therefore occurred requiring just compensation.

Requiring a property owner to permanently allow a cable company to place cable equipment on the property is not the same as instituting a fire watch at an uninhabited structure to prevent arson fires. The latter is a valid exercise of the police power to protect public safety and it has long been held that any loss arising therefrom are *damnum absque injuria* which do not give rise to a cause of action. *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 640-641. Correctly, there is no physical taking, where, as here, the government undertakes an action to remedy a threat which the property owner has been

unable to remedy. *Brown v. State of California* (1993) 21 Cal.App.4th 1500 [no inverse condemnation cause of action where the state entered property to undertake cleanup of toxic wastes to prevent water pollution and to protect the health and safety of the surrounding residents].

The evidence (see, Part II A and B, *ante*) established that the security provided by Ali at the Hotel was totally inadequate, and, as a result, the property was the subject of numerous arson fires in a very short period of time. Both Captain George and Tharpe's testimony established that the Ferraro was not secured and easily accessible to transients and the scene of numerous fires. Ali does not dispute this. The firefighters, transients and the surrounding neighborhood were placed in danger every time a fire broke out. It is clear that Ali was not up to the duty placed on him to keep his property in a reasonably safe condition. See, *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.App.4th 666, 674. Having clearly established that (1) there were numerous arson fires, (2) the building was accessible to transients, (3) there was considerable risk to life and property from the fires and the hazardous condition of the building, and (4) securing the property was necessary, the City responded appropriately by boarding up the building and placing a fire watch at the hotel.

The City's actions did not cause any damage to the property. Mr. Hilton, Ali's financial advisor, testified that the City's action of August 17, 1989, did "no damage whatsoever to the property." (RT, 65:8-14.) Even if there had been damage, the courts have consistently held that "property damage incidentally caused by the action of

public employees in the pursuit of their duties" is not a taking. *Customer Co. v City of Sacramento* (1995) 10 Cal.4th 368, 378. Indeed, the court's ruling places appellant in the rather anomalous situation of having "taken" property which it preserved and did not damage, when it could have substantially damaged the property in the exercise of its police power without having "taken" the property. *The National Board of Young Men's Christian Associations v. United States* (1969) 395 U.S. 85, 23 L.Ed. 117, 89 S.Ct. 1511 [no taking for damage done by rioters after forcing army to take shelter in building which was further damaged by the rioters after the army was forced to retreat]; *Customer Co, supra,* [no compensation for property damage caused by police using tear gas in order to apprehend a fleeing felon].

Moreover, there was no intended use or enjoyment by the public. "To make a use public in character, a duty must fall on the person or corporation holding the property appropriated by eminent domain to furnish the public with the *use* intended and the public must be entitled to *use or enjoy the property taken." Brown v. State of California, supra,* 21 Cal.App.4th at p. 1504; internal quotations and citation omitted; emphasis in the original. Like the cleanup of toxic waste in *Brown,* there was no intended use or enjoyment by the public here. To the contrary, what was intended was to prevent unauthorized entry and to protect the structure, transients, firefighters and the neighborhood from the onslaught of repetitive arson fires. Fire prevention falls unambiguously within the definition of the police power, the City's research revealed no case that remotely suggests that the prevention or

suppression of fires is not a valid exercise of the police power.

Lastly, the City's action did not prevent Ali or his representatives from access to the property. Mr. Hilton testified that he had been granted access to the property on many occasions. (RT, 61:20-65:2.) He was on the site with one of the Harouni's while a soils test was being conducted by Harouni's engineers. (RT, 63:11-28.) Indeed, the Harounis had separate access to the property for their purposes. (RT, 64:27-65:2.) The firm of MacIntosh and MacIntosh entered the property to conduct an appraisal for Ali. (RT, 64:11-16.) Thus, Ali still retained access to the property and its use.

In securing the Ferraro Hotel, the City exercised its police powers to secure a building which was a hazard to the public. The City was forced to act because Ali was unable or unwilling to take the necessary steps to correct the situation and protect the public. There is no cause of action based upon a theory of inverse condemnation, where, as here, the plaintiff has been given ample notice of the problem which must be corrected, and failing to do so, the City is required to act in his stead. *Duffy v. City of Long Beach* (1988) 210 Cal.App.3d 1352, 1358.

The court's determination that there was a physical taking is clearly erroneous and contrary to law.

B. THERE WAS NO REGULATORY TAKING.

1. Ali's Self-Imposed Delay In Seeking His Administrative Remedies Did Not Result In A Compensable Taking.

It is well settled that one must first exhaust all available administrative remedies in order to permit the local government to either rescind a regulation or exempt the property from the regulation before resorting to the courts for just compensation for a regulatory taking. *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13-14. Here, Ali was afforded every opportunity to seek administrative review of the determination that the Ferraro Hotel was a SRO hotel and was even mailed or given the necessary forms on at least two occasions. (See, pp. 5 and 13, *ante*.) For whatever reason known but to him, Ali just did not feel the need to do so. Under these circumstances, the resulting self-imposed delay in obtaining the relief he wanted is not a temporary regulatory taking. *Patrick Media Group, Inc. v. California Coastal Commission* (1992) 9 Cal.App.4th 592, 611-612; *Guinnane v. City and County of San Francisco* (1987) 197 Cal.App.3d 862, 870.

The facts here showing self-imposed delay are remarkably similar to the facts in *Guinnane v. City and County of San Francisco, supra*. In *Guinnane*, the plaintiff argued that the City's delay in acting on his building permit (at least four years) was so excessive and unreasonable that it constituted a taking without compensation. The court rejected the argument, ruling that the long delay was necessary for a proper review and study of the application. *Id.* at p. 870. Moreover, the plaintiff was asked by the planning department to submit certain

information in support of the proposed negative declaration and "failed to submit all of the requested information until more than *three years later*, in September 1985." *Id.* at p. 865; emphasis in the original. The plaintiff in *Guinnane* had also prematurely filed a lawsuit before exhausting his remedies[18]. *Id.* The court concluded that the excessive delay was attributable to plaintiff's "conduct and inaction." *Id.* at p. 870. Here, it is quite clear that an early resolution of this dispute was made impossible due to Ali's conduct and inaction, which were described as "inexplicable" by Ms. Zeidman, considering the importance of this to Ali and the information he possessed to support his position. (See, p. 14 and n. 15, *ante.*)

Important in the *Guinnane* court's analysis was, as here, the plaintiff's ability to sell his property during the period of delay as well as the freedom "to sell or develop their property when the proceedings ended." *Id.* at p. 869. The resulting fluctuations in value over time were not a taking in the constitutional sense requiring compensation. *Id.*

The failure to seek administrative review and then to seek compensation on a claim for inverse condemnation is disfavored in the law and contrary to sound public policy. As was stated in *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 611-612:

> "A public agency's capacity to plan its actions in the public interest and to make reasonable and responsible allocations of resources that it holds in trust for the public requires the agency be

---

[18] In the instant matter, we have a judicial determination that Ali failed to exhaust his administrative remedies. (JE 187.)

> alerted promptly both when its decisions are questioned, and when, as a result of a particular decision, the agency may be liable for inverse condemnation damages. . . . [¶] The requirement that challenges to administrative actions constituting takings be brought initially by administrative mandamus assures that the administrative agency will have the alternate of changing a decision for which compensation might be required. *If no such early opportunity were given, and instead, persons were permitted to stand in the face of administrative actions alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the theory that the administrative action resulted in a taking for a public use, meaningful government fiscal planning would be impossible.*" (Emphasis added.)

Here, Ali ultimately obtained the relief he wanted after he finally exhausted his administrative remedies[19]. The delay in obtaining that relief, from the City's perspective, was not only reasonable, it was legally compelled.

2. There Was No Temporary Regulatory Taking Because Ali Retained A Valuable Use Of His Property, And The City's Actions Substantially Advanced A Legitimate State Interest.

The invalidity of a local land use statute or regulation does not, by itself, support a conclusion that the

---

[19] The writ of administrative mandate in this case evolves from the assessment hearings for the cost of security at the Ferraro, not from the issues asserted in the inverse condemnation cause of action.

application of an invalid regulation to a property constitutes a temporary regulatory taking. "An invalid regulation is not necessarily an unconstitutional one." *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1080. In *Del Oro Hills*, a residential growth control initiative conflicted with the City's general plan and violated provisions of the state planning and zoning laws. However, relying on the two pronged test for a regulatory taking in *Agins v. City of Tiburon* (1980) 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138, the *Del Oro* Court held that (1) the plaintiff failed to meet its burden of showing that the invalid regulation promoted no legitimate state interest and was thus facially invalid under the takings standards (31 Cal.App.4th at 1065) and (2) plaintiff failed to show that the enactment deprived the property owner of all economically viable use of its property. *Del Oro Hills, supra*, 31 Cal.App.4th at pp. 1079-1081.

The City's ordinance (Ordinance No. 164175, JE 122) imposing a moratorium on the demolition of SRO hotels served a legitimate state interest: the preservation of low income housing. That interest was a priority for the Councilperson representing the district where the Ferraro was located. (JA, XIII, p. 3681, ¶ 11; Molina deposition, pp. 17, line 21-20, line 6.) The maintenance of an adequate housing supply is a substantial and legitimate governmental interest. *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 264; *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, 109. Plaintiff here, like the plaintiff in *Del Oro*, has failed to meet his burden to show that the

ordinance, although invalid under state law[20], promoted no legitimate state interest. Under these circumstances, Ali's remedy is an action to invalidate the ordinance and/or its application to his property. *Del Oro Hills, supra,* 31 Cal.App.4th at p. 1080; accord, *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 709 ["Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation." quoting from *PFZ Properties, Inc. v. Rodriguez* (1st Cir. 1991) 928 F.2d 28]

Moreover, there is no showing that plaintiff was denied all economically viable use of his property. Although there was a delay in the sale of his property to Harouni, Ali did sell to the original purchaser. Ali even had backup offers for the property, one of which was for more than Harouni's offer. (RT, 44:2-45:10; JE 139.) The final sales price was $2,350,000.00 (RT, 69:8-20), not the $2,700,000.00 stated in the original sales contract. (JE 135.) Davis Harouni testified that the price reduction was caused by three factors: (1) change in the market, (2) street dedication requirements in existence, but not taken into consideration at the time of the original contract in 1988, decreased the buildable area of the parcel, thus reducing its value, and (3) changes in the City's parking requirements reduced the size of the project.

---

[20] In the prior decision, B 077712, this Court held that the application of Ordinance No. 164175 to the Ferraro Hotel was in conflict with the Ellis Act, Government Code section 7060.7, subdivision (1).

However, it is well-settled that where, as here, compensation is claimed because of diminished property values, the inquiry focuses on the uses of the property which remain. *Guinnane, supra,* 197 Cal.App.3d at 868. Interim valuation fluctuations during the government decision making process do not result in a taking. *Id.* at 869. One cannot establish a taking merely by showing the inability to exploit a property interest one believed was available. *Terminals Equipment Co. v. City and County of San Francisco* (1990) 221 Cal.App.3d 234, 244. Even a substantial diminution in value does not constitute a taking. See, *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036 and the cases cited therein. To the extent that a portion of the decrease in value was due to the City adopting more restrictive parking requirements, it is a noncompensable regulation which does not result in a taking. *Redevelopment Agency v. Tobriner* (1984) 153 Cal.App.3d 367, 377.

Best summarized, the state of the law and this case is:

> "There is no constitutional right on the part of landowners to develop their property for maximum economic profit, or to receive compensation when land use regulations restrict their ability to do so. As stated by the United States Supreme Court: '[T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.' (Citations omitted.)" *Terminals Equipment, supra,* 221 Cal.App.3d at p. 244.

The enforcement of a City ordinance which was later determined to be in conflict with the Ellis Act does not amount to a taking for public use requiring compensation. Ali was not denied the economic use of his property, and there was a significant public interest in the moratorium ordinance. Moreover, Ali significantly contributed to the continued enforcement of the ordinance by his obstinate refusal to seek administrative review until compelled to do so by the court.

VII. CONCLUSION

For the reasons stated above, there has been no physical or temporary regulatory taking of plaintiff's property as a matter of law and the trial court's determination must be set aside.

Dated: February 18, 1998

Respectfully submitted,

JAMES K. HAHN, City Attorney
CLAUDIA McGEE HENRY,
Senior Assistant City Attorney
MICHAEL L. KLEKNER,
Deputy City Attorney

By /s/ Michael L. Klekner
MICHAEL L. KLEKNER
Deputy City Attorney

Attorneys for Defendant,
Appellant and Cross-Respondent,
CITY OF LOS ANGELES